

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

**May 27, 2020**

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

KELLY DAWN L,

Plaintiff,

v.

ANDREW M. SAUL,  
COMMISSIONER OF SOCIAL  
SECURITY,<sup>1</sup>

Defendant.

NO: 1:19-CV-3091-FVS

ORDER DENYING PLAINTIFF'S  
MOTION FOR SUMMARY  
JUDGMENT AND GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

BEFORE THE COURT are the parties' cross-motions for summary judgment.  
ECF Nos. 12, 13. This matter was submitted for consideration without oral  
argument. Plaintiff is represented by attorney D. James Tree. Defendant is

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<sup>1</sup> Andrew M. Saul is now the Commissioner of the Social Security  
Administration. Accordingly, the Court substitutes Andrew M. Saul as the  
Defendant and directs the Clerk to update the docket sheet. *See* Fed. R. Civ. P.  
25(d).2

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND  
GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT ~ 1

1 represented by Special Assistant United States Attorney Jeffrey E. Staples. The  
2 Court, having reviewed the administrative record and the parties' briefing, is fully  
3 informed. For the reasons discussed below, Plaintiff's Motion, ECF No. 12, is  
4 denied and Defendant's Motion, ECF No. 3, is granted.

### 5 **JURISDICTION**

6 Plaintiff Kelly Dawn L.<sup>2</sup> (Plaintiff), filed for disability insurance benefits  
7 (DIB) and supplemental security income (SSI) on February 4, 2016, alleging an  
8 onset date of November 15, 2014, in both applications. Tr. 276-90. Benefits were  
9 denied initially, Tr. 167-75, and upon reconsideration, Tr. 178-89. Plaintiff  
10 appeared at a hearing before an administrative law judge (ALJ) on March 5, 2018.  
11 Tr. 74-106. On May 23, 2018, the ALJ issued an unfavorable decision, Tr. 16-34,  
12 and on March 1, 2019, the Appeals Council denied review. Tr. 1-7. The matter is  
13 now before this Court pursuant to 42 U.S.C. § 405(g); 1383(c)(3).

### 14 **BACKGROUND**

15 The facts of the case are set forth in the administrative hearings and  
16 transcripts, the ALJ's decision, and the briefs of Plaintiff and the Commissioner, and  
17 are therefore only summarized here.

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18  
19 <sup>2</sup> In the interest of protecting Plaintiff's privacy, the Court will use Plaintiff's first  
20 name and last initial, and, subsequently, Plaintiff's first name only, throughout this  
21 decision.

1 Plaintiff was 56 years old at the time of the hearing. Tr. 96. She has a GED.  
2 Tr. 96. She has work experience as an intake worker at a women's shelter and as a  
3 caregiver and cashier. Tr. 96-100.

4 Plaintiff testified she cannot work because she has panic attacks and anxiety.  
5 Tr. 88-89. She does not like to leave her house. Tr. 85, 88. She feels socially  
6 awkward due to her anxiety and panic attacks. Tr. 88-89. When she has anxiety,  
7 she gets really nervous and it is hard for her to talk. Tr. 90. She has anxiety attacks  
8 a couple of times per week for a couple of hours at a time. Tr. 90. She also has back  
9 pain and migraines. Tr. 88, 92.

#### 10 STANDARD OF REVIEW

11 A district court's review of a final decision of the Commissioner of Social  
12 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is  
13 limited; the Commissioner's decision will be disturbed "only if it is not supported by  
14 substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158  
15 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a reasonable  
16 mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and  
17 citation omitted). Stated differently, substantial evidence equates to "more than a  
18 mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted).  
19 In determining whether the standard has been satisfied, a reviewing court must  
20 consider the entire record as a whole rather than searching for supporting evidence in  
21 isolation. *Id.*

1 In reviewing a denial of benefits, a district court may not substitute its  
2 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
3 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one  
4 rational interpretation, [the court] must uphold the ALJ’s findings if they are  
5 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674  
6 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an ALJ’s  
7 decision on account of an error that is harmless.” *Id.* An error is harmless “where it  
8 is inconsequential to the [ALJ’s] ultimate nondisability determination.” *Id.* at 1115  
9 (quotation and citation omitted). The party appealing the ALJ’s decision generally  
10 bears the burden of establishing that it was harmed. *Shinseki v. Sanders*, 556 U.S.  
11 396, 409-10 (2009).

## 12 FIVE-STEP EVALUATION PROCESS

13 A claimant must satisfy two conditions to be considered “disabled” within the  
14 meaning of the Social Security Act. First, the claimant must be “unable to engage in  
15 any substantial gainful activity by reason of any medically determinable physical or  
16 mental impairment which can be expected to result in death or which has lasted or  
17 can be expected to last for a continuous period of not less than twelve months.” 42  
18 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s impairment must  
19 be “of such severity that he is not only unable to do his previous work[,], but cannot,  
20 considering his age, education, and work experience, engage in any other kind of  
21

1 substantial gainful work which exists in the national economy.” 42 U.S.C. §§  
2 423(d)(2)(A), 1382c(a)(3)(B).

3 The Commissioner has established a five-step sequential analysis to determine  
4 whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§ 404.1520(a)(4)(i)-  
5 (v), 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s  
6 work activity. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If the claimant is  
7 engaged in “substantial gainful activity,” the Commissioner must find that the  
8 claimant is not disabled. 20 C.F.R. §§ 404.1520(b), 416.920(b).

9 If the claimant is not engaged in substantial gainful activity, the analysis  
10 proceeds to step two. At this step, the Commissioner considers the severity of the  
11 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the  
12 claimant suffers from “any impairment or combination of impairments which  
13 significantly limits [his or her] physical or mental ability to do basic work  
14 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),  
15 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,  
16 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.  
17 §§ 404.1520(c), 416.920(c).

18 At step three, the Commissioner compares the claimant’s impairment to  
19 severe impairments recognized by the Commissioner to be so severe as to preclude a  
20 person from engaging in substantial gainful activity. 20 C.F.R. §§  
21 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more severe

1 than one of the enumerated impairments, the Commissioner must find the claimant  
2 disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

3 If the severity of the claimant's impairment does not meet or exceed the  
4 severity of the enumerated impairments, the Commissioner must pause to assess the  
5 claimant's "residual functional capacity." Residual functional capacity (RFC),  
6 defined generally as the claimant's ability to perform physical and mental work  
7 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§  
8 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of the  
9 analysis.

10 At step four, the Commissioner considers whether, in view of the claimant's  
11 RFC, the claimant is capable of performing work that he or she has performed in the  
12 past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). If the  
13 claimant is capable of performing past relevant work, the Commissioner must find  
14 that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f). If the  
15 claimant is incapable of performing such work, the analysis proceeds to step five.

16 At step five, the Commissioner should conclude whether, in view of the  
17 claimant's RFC, the claimant is capable of performing other work in the national  
18 economy. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this  
19 determination, the Commissioner must also consider vocational factors such as the  
20 claimant's age, education, and past work experience. 20 C.F.R. §§  
21 404.1520(a)(4)(v), 416.920(a)(4)(v). If the claimant is capable of adjusting to other

1 work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. §§  
2 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other  
3 work, analysis concludes with a finding that the claimant is disabled and is therefore  
4 entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1).

5 The claimant bears the burden of proof at steps one through four above.  
6 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to  
7 step five, the burden shifts to the Commissioner to establish that (1) the claimant is  
8 capable of performing other work; and (2) such work “exists in significant numbers  
9 in the national economy.” 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran v.*  
10 *Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

### 11 **ALJ’S FINDINGS**

12 At step one, the ALJ found Plaintiff did not engage in substantial gainful  
13 activity since November 15, 2014, the alleged onset date. Tr. 18. At step two, the  
14 ALJ found that Plaintiff has the following severe impairments: lumbar and cervical  
15 degenerative disc disease; affective disorder (depression versus bipolar); anxiety  
16 related disorders (anxiety, generalized anxiety disorder, and panic); personality  
17 disorder; and posttraumatic stress disorder. Tr. 18-19. At step three, the ALJ found  
18 that Plaintiff does not have an impairment or combination of impairments that meets  
19 or medically equals the severity of a listed impairment. Tr. 20.

20 The ALJ then found that Plaintiff has the residual functional capacity to  
21 perform medium work with the following additional limitations:

1 The claimant can frequently balance, stoop, kneel, and crouch, but no  
 2 climb or crawl; should avoid concentrated exposure to vibration and  
 3 hazards; could perform simple, routine tasks and follow short, simple  
 4 instructions; could do work that needs little or no judgment; could  
 5 perform simple duties that can be learned on the job in a short period;  
 6 requires a work environment that is predictable and with few work  
 7 setting changes; can work in proximity to coworkers but not in a  
 8 cooperative or team effort; requires a work environment that has no  
 9 more than superficial interactions with coworkers; and requires a work  
 10 environment without public contact.

11 Tr. 21.

12 At step four, the ALJ found that Plaintiff is unable to perform any past  
 13 relevant work. Tr. 26. At step five, after considering the testimony of a vocational  
 14 expert and Plaintiff's age, education, work experience, and residual functional  
 15 capacity, the ALJ found there are other jobs existing in significant numbers in the  
 16 national economy that Plaintiff can perform such as laundry worker, linen room  
 17 attendant, or hand packager. Tr. 27. Thus, the ALJ concluded that Plaintiff has not  
 18 been under a disability, as defined in the Social Security Act, from November 15,  
 19 2014, through the date of the decision. Tr. 28.

## 20 ISSUES

21 Plaintiff seeks judicial review of the Commissioner's final decision denying  
 disability income benefits under Title II and supplemental security income under  
 Title XVI of the Social Security Act. ECF No. 12. Plaintiff raises the following  
 issues for review:

1. Whether the ALJ properly evaluated Plaintiff's symptom testimony;
- and



2. Whether the ALJ properly considered the medical opinion evidence.  
ECF No. 12 at 2.

## DISCUSSION

### A. Symptom Testimony

Plaintiff contends the ALJ improperly rejected her symptom testimony.  
ECF No. 12 at 4-16. An ALJ engages in a two-step analysis to determine whether a claimant's testimony regarding subjective pain or symptoms is credible. "First, the ALJ must determine whether there is objective medical evidence of an underlying impairment which could reasonably be expected to produce the pain or other symptoms alleged." *Molina*, 674 F.3d at 1112 (internal quotation marks omitted). "The claimant is not required to show that her impairment could reasonably be expected to cause the severity of the symptom she has alleged; she need only show that it could reasonably have caused some degree of the symptom." *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (internal quotation marks omitted).

Second, "[i]f the claimant meets the first test and there is no evidence of malingering, the ALJ can only reject the claimant's testimony about the severity of the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal citations and quotations omitted). "General findings are insufficient; rather, the ALJ must identify what testimony is not credible and what evidence undermines

1 the claimant's complaints." *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834  
2 (1995); *see also Thomas v. Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) ("[T]he  
3 ALJ must make a credibility determination with findings sufficiently specific to  
4 permit the court to conclude that the ALJ did not arbitrarily discredit claimant's  
5 testimony."). "The clear and convincing [evidence] standard is the most  
6 demanding required in Social Security cases." *Garrison v. Colvin*, 759 F.3d 995,  
7 1015 (9th Cir. 2014) (quoting *Moore v. Comm'r of Soc. Sec. Admin.*, 278 F.3d 920,  
8 924 (9th Cir. 2002)).

9 In assessing a claimant's symptom complaints, the ALJ may consider, *inter*  
10 *alia*, (1) the claimant's reputation for truthfulness; (2) inconsistencies in the  
11 claimant's testimony or between his testimony and his conduct; (3) the claimant's  
12 daily living activities; (4) the claimant's work record; and (5) testimony from  
13 physicians or third parties concerning the nature, severity, and effect of the  
14 claimant's condition. *Thomas*, 278 F.3d at 958-59.

15 First, the ALJ found the record does not support Plaintiff's allegations  
16 regarding the severity of her symptoms and the degree of functional limitation  
17 alleged. Tr. 22. An ALJ may not discredit a claimant's pain testimony and deny  
18 benefits solely because the degree of pain alleged is not supported by objective  
19 medical evidence. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001);  
20 *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991); *Fair v. Bowen*, 885 F.2d  
21 597, 601 (9th Cir. 1989). However, the medical evidence is a relevant factor in

1 determining the severity of a claimant's pain and its disabling effects. *Rollins*, 261  
2 F.3d at 857. Minimal objective evidence is a factor which may be relied upon in  
3 discrediting a claimant's testimony, although it may not be the only factor. *See*  
4 *Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005).

5 With regard to Plaintiff's back impairment, the ALJ found Plaintiff's  
6 allegations regarding pain and functional limitations are not supported by the  
7 record. Tr. 22-23. The ALJ noted that around Plaintiff's alleged onset date in  
8 November 2014, Plaintiff was seen for routine medical care for mainly minor  
9 issues and it was noted that balance and gait were intact and there was no motor  
10 weakness. Tr. 22, 390-91, 432-36. In November 2015, Plaintiff was seen for back  
11 pain rated at 9/10, but she had normal gait and posture, no neck abnormality, and  
12 normal upper and lower extremities. Tr. 406-08. She went to the emergency room  
13 in November and December 2015 complaining of sciatic nerve pain but the only  
14 finding was right paraspinal muscle tenderness with normal range of motion in the  
15 back and normal neurological exams. Tr. 409-15. March 2016 x-rays of the  
16 cervical spine showed mild degenerative changes with a congenital fusion at C2-3  
17 and a lumbar spine x-ray revealed only mild narrowing of L4-5 and L5-S1 discs.  
18 Tr. 440-41. A physical exam on the same date was completely normal. Tr. 23,  
19 465. Other physical exams throughout the record were essentially normal. Tr. 23,  
20 460, 488, 492, 497, 500-01, 505, 508-09, 512, 516, 657, 661, 725-26, 729-30. In  
21 March 2017, Plaintiff denied any physical symptoms contributing to her emotional

1 discomfort. Tr. 24, 556. The ALJ's conclusions regarding the evidence of  
2 physical limitations are supported by substantial evidence.

3 With regard to Plaintiff's mental impairments, the ALJ also found the  
4 allegations of symptom severity and degree of functional limitation are not  
5 supported by the record. Tr. 22-23. The ALJ noted that around her alleged onset  
6 date, Plaintiff was taking medication for anxiety and depression. Tr. 22, 391, 432.  
7 The ALJ observed that her medications were effective because on exam, Plaintiff  
8 was in no acute distress, had normal mood and affect, was active and alert, and had  
9 normal recent and remote memory. Tr. 22, 390. In January 2016, Plaintiff  
10 presented as depressed with poor insight, but was active and alert, oriented in all  
11 spheres, and had normal memory. Tr. 23, 429. Between March 2016 and  
12 November 2017, Plaintiff's mental or psychiatric status was frequently normal on  
13 exam. Tr. 23, 459, 465, 488, 492, 497, 500, 505, 508, 512, 516, 657, 661, 725,  
14 729. Plaintiff started counseling in April 2016 and reported good days and bad  
15 days in May 2016 but was sleeping better overall. Tr. 23, 453, 577. She started  
16 Wellbutrin and a mental status examination in March 2017 was normal except for a  
17 sad mood and affect. Tr. 23, 557, 561. In April 2017, her primary care provider  
18 indicated that Plaintiff's anxiety was improved with medication. Tr. 24, 496. In  
19 July 2017, her mental status was normal on exam and she stopped counseling to  
20 focus on hepatitis C treatment. Tr. 24, 488, 634-35.

1 Plaintiff contends the ALJ ignored findings from examining psychologists  
2 and therapy notes which support Plaintiff's allegations. ECF No. 12 at 5-7 (citing  
3 Tr. 393, 403, 437, 453, 544, 554, 568, 573-74, 577-78. However, the ALJ  
4 considered many of the records cited by Plaintiff in evaluating the severity of her  
5 mental impairments. Tr. 20-21. The ALJ noted that examining psychologist Mark  
6 Duris, Ph.D., recorded normal mental status exam findings and found moderate  
7 depression and anxiety but assessed no more than moderate limitations. Tr. 20-21,  
8 393-94. The ALJ cited the observations of Lorri Burns during a DSHS facilitated  
9 appointment that Plaintiff appeared depressed, did not smile, and apologized for  
10 things that were not her fault, but was polite, well groomed, and cooperative. Tr.  
11 20-21, 437. Additionally, the ALJ noted some mental status exam findings  
12 throughout the record showed variable insight and judgment but the most recent  
13 were fair to good. Tr. 21, 539, 545, 550, 557, 657, 661, 665, 725, 729, 734.

14 The ALJ also acknowledged that Plaintiff expressed some problems leaving  
15 her home but found the limitations from this issue and depression caused no more  
16 than moderate limitations at step three. Tr. 21. In short, the ALJ did not ignore  
17 negative findings and conclude Plaintiff had no limitations; indeed, the ALJ  
18 included limitations in the RFC to account for those mental limitations reasonably  
19 found to be supported by the record. Tr. 21. Furthermore, to the extent the record  
20 could have been interpreted differently, the ALJ, not this court, is responsible for  
21 reviewing the evidence and resolving conflicts or ambiguities. *Magallanes v.*

1 *Bowen*, 881 F.2d 747, 751 (9th Cir.1989); *see also Richardson v. Perales*, 402 U.S.  
2 389, 400 (1971).

3 Second, the ALJ found treatment was effective. Tr. 22-23. The  
4 effectiveness of treatment is a relevant factor in determining the severity of a  
5 claimant's symptoms. 20 C.F.R. §§ 404.1529(c)(3), 416.929(c)(3); *Warre v.*  
6 *Comm'r of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir. 2006) (determining  
7 that conditions effectively controlled with medication are not disabling for  
8 purposes of determining eligibility for benefits); *Tommasetti v. Astrue*, 533 F.3d  
9 1035, 1040 (9th Cir. 2008) (recognizing that a favorable response to treatment can  
10 undermine a claimant's complaints of debilitating pain or other severe limitations).  
11 The ALJ noted that in March and April 2017, Plaintiff reported a decrease in  
12 depressive symptoms and was feeling better. Tr. 23, 554, 556. Her primary care  
13 provider indicated her anxiety was improved on medication in April 2017. Tr. 23-  
14 24, 496. In October 2017, Plaintiff reported no side effects, the current dose of  
15 medication was doing well to control her anxiety and insomnia symptoms, and she  
16 had no complaints. Tr. 23, 661.

17 Plaintiff suggests the ALJ selected a few isolated instances of improvement  
18 and that her improvement did not mean she was capable of work.<sup>3</sup> ECF No. 12 at  
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20 <sup>3</sup> Plaintiff contends the evidence "supports the fact that [Plaintiff] meets the 'C'  
21 criteria of the mental listings." ECF No. 12 at 8; *see* ECF No. 12 at 10. Plaintiff

1 9-10. However, “[s]ymptoms may wax and wane during the progression of a  
2 mental disorder. Those symptoms, however, may also subside during treatment. . .  
3 . Such evidence of medical treatment successfully relieving symptoms can  
4 undermine a claim of disability.” *Wellington v. Berryhill*, 878 F.3d 867, 876 (9th  
5 Cir. 2017) (citing *Garrison*, 759 F.3d at 1017). The ALJ’s interpretation of the  
6 record was reasonable, and this is a clear and convincing reason for giving less  
7 weight to Plaintiff’s symptom claims.

8 Third, the ALJ found inconsistencies between Plaintiff’s testimony and  
9 evidence in the record which undermine her symptom claims. Tr. 24. In  
10 evaluating a claimant’s symptom claims, an ALJ may consider the consistency of  
11 an individual’s own statements made in connection with the disability-review  
12 process with any other existing statements or conduct under other circumstances.  
13 *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996). The ALJ observed that  
14 Plaintiff testified she had not tried to work at all since 2014, but her earnings  
15 record showed she worked as a caregiver for two months in 2016. Tr. 24, 87, 299.

16 The ALJ noted Plaintiff testified that she could not do the job because of anxiety  
17

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18 bears the burden of establishing a listing is met. *Burch*, 400 F.3d at 683. A  
19 generalized assertion is not enough to establish disability at step three. *Tackett*,  
20 180 F.3d at 1100. To the extent Plaintiff intended to challenge the ALJ’s step three  
21 finding, the argument is insufficient.

1 and because she does not like to leave the house but did not mention any physical  
2 health issues, despite alleging disabling back limitations. Tr. 24, 88. Plaintiff  
3 argues this supports rather than undermines her testimony, ECF No. 12 at 12;  
4 however, the ALJ reasonably interpreted these inconsistent statements as  
5 undermining the persuasiveness of her allegations.

6 Next, the ALJ observed that despite allegations of panic attacks, there is  
7 virtually no evidence of such attacks in the record and that Plaintiff reported  
8 improvement of her anxiety, insomnia, and depression with treatment. Tr. 24, 554,  
9 556. Plaintiff cites four instances where she reported panic attacks (Tr. 433),  
10 “panic like symptoms” (Tr. 393), “panic attacks and anxiety” (Tr. 447), and “bad  
11 anxiety attacks” (Tr. 723). Even if the ALJ’s characterization of the panic attack  
12 evidence is not supported by substantial evidence, this is a small point in the ALJ’s  
13 overall consideration of inconsistencies in the record. As such, any error would be  
14 harmless. *See Carmickle v. Comm’r of Soc. Sec. Admin.*, 533 F.3d 1155, 1162-63  
15 (9th Cir. 2008).

16 The ALJ next noted that although Plaintiff testified that she does not like to  
17 leave the house, she leaves the house for appointments, grocery shopping, and to  
18 transport her grandchildren between their father and mother twice a week. Tr. 24,  
19 86, 88, 398. She also testified that she does not leave her home because she has  
20 nothing to do, Tr. 85, and did not mention difficulty leaving her home to Thomas  
21 Genthe, Ph.D., an examining psychologist. Tr. 24, 397-401. Plaintiff argues that



1 her outings away from home are qualified by anxiety and that she told other  
2 providers about her difficulty leaving home. ECF No. 12 at 12-13. However, the  
3 Court must uphold the ALJ's decision when it is not based on legal error and is  
4 supported by substantial evidence. *Tackett*, 180 F.3d at 1097. These factors were  
5 reasonably considered by the ALJ as inconsistencies in Plaintiff's reporting.

6 The ALJ also noted that despite Plaintiff's testimony that she used  
7 methamphetamines in 1996, the record contains multiple positive urinalyses for  
8 methamphetamines and amphetamines in 2017. Tr. 24, 88, 523, 526-27, 672, 685,  
9 690, 703. Plaintiff suggests the test results may be false positives and observes  
10 that no provider indicated concern about possible drug use. ECF No. 12 at 14.  
11 The test results specifically state that they are screenings only and should not be  
12 used for non-medical purposes such employment or legal testing. Tr. 523, 526-27,  
13 672, 685, 690, 703. Although the ALJ acknowledged the reason for the positive  
14 test results is "not entirely clear," the ALJ concluded the positive test results  
15 "warrant mentioning because the mental status examinations throughout the record  
16 were mostly within normal limits." Tr. 24. The Court fails to see the relationship  
17 between the ambiguous drug screens and the mental status exams. To the extent  
18 the ALJ considered this evidence in discounting Plaintiff's allegations, the ALJ  
19 erred. However, the ALJ gave other clear and convincing reasons supported by  
20 substantial evidence for giving less weight to Plaintiff's symptom allegations and  
21 the error is therefore harmless. *See Carmickle*, 533 F.3d at 1162-63.

1 Fourth, the ALJ found Plaintiff's activities of daily living are inconsistent  
2 with the disabling levels of pain and mental health symptoms alleged. Tr. 24. It is  
3 reasonable for an ALJ to consider a claimant's activities which undermine claims  
4 of totally disabling pain in assessing a claimant's symptom complaints. *See*  
5 *Rollins*, 261 F.3d at 857. However, it is well-established that a claimant need not  
6 "vegetate in a dark room" in order to be deemed eligible for benefits. *Cooper v.*  
7 *Bowen*, 815 F.2d 557, 561 (9th Cir. 1987). Notwithstanding, if a claimant is able  
8 to spend a substantial part of her day engaged in pursuits involving the  
9 performance of physical functions that are transferable to a work setting, a specific  
10 finding as to this fact may be sufficient to discredit an allegation of disabling  
11 excess pain. *Fair*, 885 F.2d at 603. Furthermore, "[e]ven where [Plaintiff's daily]  
12 activities suggest some difficulty functioning, they may be grounds for discrediting  
13 the claimant's testimony to the extent that they contradict claims of a totally  
14 debilitating impairment." *Molina*, 674 F.3d at 1113.

15 The ALJ found Plaintiff's activities "are actually quite involved," noting  
16 Plaintiff reported being able to rearrange furniture, watch television, go to church,  
17 care for her personal needs, prepare meals, feed herself, wash dishes, do laundry,  
18 vacuum, dust, take medication, renew prescriptions, schedule appointments, use a  
19 telephone and directories, mail parcels, and shop for groceries and personal needs.  
20 Tr. 24-25, 398. The ALJ concluded that these activities are inconsistent with the  
21 disabling levels of pain and mental health symptoms alleged by Plaintiff and

1 suggest a level of functioning greater than alleged in her application and testimony.  
2 Tr. 25. The ALJ also observed that the wide range of these daily activities  
3 contrasts with the limitations alleged in her function report. Tr. 26, 312-19.

4 Plaintiff contends that her activities do not translate into full-time work  
5 because she testified she spends very little time outside her home. ECF No. 12 at  
6 12-13; Tr. 88. However, even if a claimant's daily activities do not demonstrate a  
7 claimant can work, they may undermine the claimant's complaints if they suggest  
8 the severity of the claimant's limitations were exaggerated. *See Valentine v.*  
9 *Comm'r of Soc. Sec. Admin.*, 574 F.3d 685, 693 (9th Cir. 2009); *see also Molina*,  
10 674 F.3d at 1113. The ALJ's interpretation of the evidence was reasonable and  
11 this is a clear and convincing reason for finding Plaintiff's symptom claims less  
12 than fully reliable.

### 13 **B. Medical Opinion Evidence**

14 Plaintiff contends the ALJ erred in evaluating the opinions of examining  
15 psychologist Mark Duris, Ph.D., examining psychologist Thomas Genthe, Ph.D.,  
16 and reviewing physician Rox Burkett, M.D. ECF No. 12 at 16-20. There are three  
17 types of physicians: "(1) those who treat the claimant (treating physicians); (2) those  
18 who examine but do not treat the claimant (examining physicians); and (3) those  
19 who neither examine nor treat the claimant but who review the claimant's file  
20 (nonexamining or reviewing physicians)." *Holohan v. Massanari*, 246 F.3d 1195,  
21 1201-02 (9th Cir. 2001) (brackets omitted). "Generally, a treating physician's

1 opinion carries more weight than an examining physician's, and an examining  
2 physician's opinion carries more weight than a reviewing physician's." *Id.* "In  
3 addition, the regulations give more weight to opinions that are explained than to  
4 those that are not, and to the opinions of specialists concerning matters relating to  
5 their specialty over that of nonspecialists." *Id.* (citations omitted).

6 If a treating or examining physician's opinion is uncontradicted, an ALJ may  
7 reject it only by offering "clear and convincing reasons that are supported by  
8 substantial evidence." *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).  
9 "However, the ALJ need not accept the opinion of any physician, including a  
10 treating physician, if that opinion is brief, conclusory and inadequately supported by  
11 clinical findings." *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228  
12 (internal quotation marks and brackets omitted). "If a treating or examining doctor's  
13 opinion is contradicted by another doctor's opinion, an ALJ may only reject it by  
14 providing specific and legitimate reasons that are supported by substantial  
15 evidence." *Bayliss*, 427 F.3d at 1216 (citing *Lester*, 81 F.3d at 830-31).

16 *1. Mark Duris, Ph.D.*

17 Dr. Duris examined Plaintiff in February 2015 and completed a DSHS  
18 Psychological/Psychiatric Evaluation form. Tr. 392-96. He diagnosed major  
19 depressive disorder, social anxiety disorder, and dependent personality disorder. Tr.  
20 392-96. He assessed moderate limitations in six functional areas: the ability to  
21 perform activities within a schedule, maintain regular attendance, and be punctual

1 within customary tolerances without special supervision; the ability to perform  
2 routine tasks without special supervision; the ability to adapt to changes in a routine  
3 work setting; the ability to ask simple questions or request assistance; the ability to  
4 communicate and perform effectively in a work setting; and the ability to complete a  
5 normal workday and workweek without interruptions from psychologically based  
6 symptoms. Tr. 394. The ALJ gave some weight to Dr. Duris' opinion but  
7 concluded that "some of the moderate impairments seem overestimated." Tr. 25.

8 First, the ALJ found that the limitations assessed contrasted with Plaintiff's  
9 ability to live alone and perform all activities of daily living independently. Tr. 25.

10 An ALJ may discount a medical source opinion to the extent it conflicts with the  
11 claimant's daily activities. *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595,  
12 601-02 (9th Cir. 1999). The ALJ noted that Plaintiff reported living alone and being  
13 able to perform all of her activities of daily living independently, yet Dr. Duris  
14 assessed moderate impairments in the ability to act within a schedule, maintain  
15 regular attendance, be punctual, perform routine tasks without special supervision,  
16 ask simple questions or request assistance, communicate, and perform effectively.  
17 Tr. 25, 392, 394. Plaintiff contends that her ability to live alone and perform  
18 activities of daily living are consistent with her anxiety disorder and do not support  
19 rejection of limitations on maintaining attendance at work or performing work duties  
20 effectively. ECF No. 12 at 17. However, the ALJ reasonably considered Plaintiff's  
21 independence in performing daily activities and living alone in giving less weight to

1 Dr. Duris' opinion and this is a specific, legitimate reason supported by substantial  
2 evidence.

3 Second, the ALJ found Dr. Duris' mental status exam findings and mental  
4 status exam findings throughout the record do not support the limitations assessed.  
5 Tr. 25. A medical opinion may be rejected if it is unsupported by medical  
6 findings. *Bray*, 554 F.3d at 1228; *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d  
7 1190, 1195 (9th Cir. 2004); *Thomas*, 278 F.3d at 957; *Tonapetyan v. Halter*, 242  
8 F.3d 1144, 1149 (9th Cir. 2001); *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th  
9 Cir.1992). The ALJ observed that Dr. Duris noted a euthymic mood but no other  
10 unusual or abnormal findings and he indicated every other mental status exam  
11 finding was within normal limits. Tr. 395-96. The ALJ also observed that many  
12 mental status exam findings throughout the record were also essentially normal.  
13 Tr. 25; *see* Tr. 21, 23, 459, 465, 488, 492, 497, 500, 505, 508, 512, 516, 539, 545,  
14 550, 557, 657, 661, 725, 729, 665, 725, 729, 734. Plaintiff contends the ALJ erred  
15 by considering the mental status exams because psychiatric exams are subjective.  
16 ECF No. 12 at 18. However, mental status examinations are objective measures of  
17 an individual's mental health, *Buck v. Berryhill*, 869 F.3d 1040, 1049 (9th Cir.  
18 2017), and the ALJ reasonably considered them in evaluating the supportability of  
19 Dr. Duris' opinion. This is a specific, legitimate reason supported by substantial  
20 evidence.

1           2.    *Thomas Genthe, Ph.D.*

2           Dr. Genthe examined Plaintiff in December 2015 and completed a DSHS  
3 Psychological/Psychiatric Evaluation form. Tr. 397-404. He diagnosed major  
4 depressive disorder, generalized anxiety disorder, methamphetamine use in sustained  
5 remission, and alcohol use disorder in sustained remission. Tr. 398. Dr. Genthe  
6 assessed moderate limitations in eight functional areas and an overall severity rating  
7 of moderate. Tr. 399-400.

8           The ALJ gave Dr. Genthe's opinion some weight. First, the ALJ found Dr.  
9 Genthe's assessment is inconsistent with Plaintiff's daily activities. Tr. 25. As  
10 noted *supra*, a medical opinion may be discounted to the extent it conflicts with the  
11 claimant's daily activities. *Morgan*, 169 F.3d at 601-02. The ALJ found the many  
12 moderate limitations assessed by Dr. Genthe are inconsistent with Plaintiff's report  
13 that she can perform all of her personal self-care, take care of domestic and  
14 household chores, manage her medication, schedule and attend doctor's  
15 appointments, use telephones and directories, mail parcels, and shop for groceries  
16 and personal needs. Tr. 25, 398. The ALJ noted that Plaintiff indicated she could  
17 perform a full range of activities inside and outside the house and that she did not  
18 report any problem leaving her home to Dr. Genthe. Tr. 25. Furthermore, the ALJ  
19 noted that Plaintiff's chief complaints to Dr. Genthe were primarily physical and her  
20 only mental health complaint was grief, which is inconsistent with the limitations  
21 assessed. Tr. 24, 397. Plaintiff contends the ALJ should not have considered her

1 own assessment of her condition. ECF No. 10 at 19. Even if that is correct, the  
2 ALJ's point that Plaintiff's function regarding daily activities exceeds the limitations  
3 assessed is valid and a specific, legitimate reason for giving less weight to Dr.  
4 Genthe's opinion.

5 Second, the ALJ found Dr. Genthe's opinion is inconsistent with his exam  
6 findings. Tr. 25. A medical opinion may be rejected by the ALJ if it contains  
7 inconsistencies or is inadequately supported. *Bray*, 554 F.3d at 1228; *Thomas*, 278  
8 F.3d at 957. The ALJ noted that other than deficits in insight and judgment, Dr.  
9 Genthe's mental status exam results were within normal limits. Tr. 25, 401-02.  
10 Additionally, the PAI test administered by Dr. Genthe indicated Plaintiff "reports a  
11 degree of anxiety that is unusual even in clinical samples." Tr. 25, 403. The ALJ  
12 also noted that the PAI indicates that drug use may be the source of some problems  
13 in Plaintiff's life although she reported to Dr. Genthe that she had not used  
14 substances or alcohol for at least a few years. Tr. 25, 398, 404. This is a specific,  
15 legitimate reason supported by substantial evidence.

16 3. *Rox Burkett, M.D.*

17 Dr. Burkett reviewed the record in February 2018 and noted diagnoses of  
18 degenerative lumbar disc disease, anxiety, affective/depressive disorders, and PTSD.  
19 Tr. 715. Dr. Burkett opined that Plaintiff's most limiting and well-documented  
20 problems are mental. Tr. 716. He opined that Plaintiff's limitations meet or at least  
21 equal listing 12.02 or 12.04. Tr. 716. He indicated that Plaintiff "might appear OK



1 for short periods of time” but that she could not work an eight-hour day, 40 hours  
2 per week, 50 weeks of the year. Tr. 716. The ALJ gave slight weight to Dr.  
3 Burkett’s opinion. Tr. 25-26.

4 First, the ALJ found that Dr. Burkett took the role of advocate instead  
5 objective reviewer. Tr. 25, 716. When a physician is involved in the application  
6 process and advocates for the patient, the physician’s opinion may be rejected  
7 because it is not objective. *Crane v. Shalala*, 76 F.3d 251, 254 (9th Cir. 1996); *see*  
8 *also Matney*, 981 F.2d at 1020 (affirming ALJ’s finding that physician’s opinion was  
9 entitled to less weight because he agreed to become an advocate and assist in the  
10 application process). The ALJ found the tone of Dr. Burkett’s letter indicates he  
11 took on the role of advocate, and Plaintiff does not address this reason. Tr. 25; ECF  
12 No. 12 at 20; ECF No. 14 at 9. Defendant argues that Dr. Burkett’s conclusion that  
13 “this claimant is very close, if not the worst case of combined mental health issues”  
14 he had seen during 30 years of practice is hyperbolic and suggests a position of  
15 advocacy since those psychologists who examined Plaintiff assessed no more than  
16 moderate limitations and did not suggest that she meets or equals a listing. Tr. 717;  
17 ECF No. 13 at 9. The ALJ reasonably considered the advocacy tone of Dr. Burkett’s  
18 opinion in assigning it less weight.<sup>4</sup>

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19  
20 <sup>4</sup> The ALJ also noted that Dr. Burkett critiqued an examining mental health  
21 evaluator (unspecified, but presumably Dr. Genthe or Dr. Duris) who “noted some

1 Second, the ALJ noted that Dr. Burkett is a physician, not a psychologist,  
2 and that his expertise as a medical reviewer is for medical issues rather than  
3 psychological issues. Tr. 25-26. As the ALJ acknowledged, under general  
4 principles of law, Dr. Burkett is qualified to give a medical opinion as to Plaintiff's  
5 mental state as it relates to her physical disability. *Sprague v. Bowen*, 812 F.2d  
6 1226, 1232 (9th Cir. 1987). However, the ALJ observed that in his 12 years as a  
7 DDS reviewer in Utah, Dr. Burkett would not have reviewed mental health issues,  
8 which is experience he cited as giving him authority and expertise to analyze the  
9 mental health evidence in this record. Tr. 25-26.

10 Furthermore, the ALJ noted that Dr. Burkett cited a Social Security Program  
11 Operations Manual System (POMS) section which does not exist, which  
12 diminished his purported expertise. Tr. 26. Indeed, Dr. Burkett cited his 12 years  
13 of experience as a medical consultant for Utah DDS and adjudication of over  
14 65,000 cases, and asserted that, "I know the sequential evaluation, the listing and  
15 POMS." Tr. 715. According to Dr. Burkett, "POMS 22000.020 says any benefit  
16 of the doubt to be given to the claimant." Tr. 716. However, POMS 22000.020

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19 of the problems" but, according to Dr. Burkett, did not "factor in" treating sources  
20 who should have been given more weight than a one-time evaluator. Tr. 25, 716.  
21 The ALJ observed that Dr. Burkett is also a one-time evaluator who did not even  
examine Plaintiff. Tr. 25.

1 does not exist. *See* Social Security Administration, *Program Operations Manual*  
2 *Systems*, <https://secure.ssa.gov/apps10/poms.nsf/Home?readform> (last visited May  
3 25, 2020). The ALJ reasonably gave less weight to Dr. Burkett's opinion based on  
4 this reference.

5 Third, the ALJ found that the record consistently reflected relatively normal  
6 physical, mental, and neurological examinations. Tr. 26. The ALJ also noted that  
7 Plaintiff and her primary care provider reported improvement of her mental health  
8 symptoms. Tr. 26. The ALJ observed there were minimal findings on  
9 examination during hospital visits and only mild findings in diagnostic imaging.  
10 Tr. 26. As discussed *supra*, the ALJ's interpretation of the record is reasonable  
11 and these findings are supported by substantial evidence. This is a specific,  
12 legitimate reason for giving less weight to Dr. Burkett's opinion.

### 13 CONCLUSION

14 Having reviewed the record and the ALJ's findings, this Court concludes the  
15 ALJ's decision is supported by substantial evidence and free of harmful legal error.  
16 Accordingly,

17 1. Plaintiff's Motion for Summary Judgment, **ECF No. 12**, is **DENIED**.

18 2. Defendant's Motion for Summary Judgment, **ECF No. 13**, is  
19 **GRANTED**.

